Supreme Court, U. S.
FILED
OCT 13 1976
MICHAEL RODAK, JR., CLERK

No. 76-404

In the

Supreme Court of the United States

ILLINOIS BRICK COMPANY, AMERICAN BRICK CO., AMPRESS BRICK CO., INC., CHICAGO BLOCK CO., INC., E. L. RAMM COMPANY, HEIGHTS BLOCK, INC., JOLIET CONCRETE PRODUCTS, INC. and NORTHFIELD BLOCK CO.,

Petitioners,

vs.

STATE OF ILLINOIS, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE GRANT OF A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF ADDITIONAL FACTS	1
ARGUMENT	4
I. Hanover Shoe Does Not Establish As A Rule Of Law That Only The First Purchaser Of An Illegally Price Fixed Product Has Standing To Sue Under The Federal Antitrust Laws	4
II. The Mangano Weakness	6
III. The Pass-On By Contractors To The State Plaintiffs Of Conspiratorially Fixed Prices For Concrete Block Are Factual Questions To Be Left For Proof At Trial	8
IV. The Affirmance Of Standing By The Seventh Circuit Is Consistent With The Sweeping Language Of The Statute, The Policy Encouraging Private Enforcement Of The Antitrust Laws, The Decisions Of This Court And The Second, Fourth, Fifth, Sixth, Eighth, Ninth And District Of Columbia Circuit Courts	11
CONCLUSION	12

Cases Cited

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971) 7

Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967) 9

Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973, Decker, J.) 4

Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir.), cert. denied sub nom., Illinois v. Commonwealth Edison Co., 375 U.S. 834 (1936) 3

Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967) 8

PAGE

Hanover Shoe, Inc. v. United States Machinery Corp., 392 U.S. 481 (1968) 2, 3, 4, 5

Hawaii v. American Oil Co., 405 U.S. 251 (1972) 5

In re Master Key Antitrust Litigation, 1973-2 Trade Case, ¶ 74,860 (D. Conn. 1973), aff'd, 528 F.2d 5 (2d Cir. 1975) 4, 7, 8

In re Western Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied sub nom., Standard Oil Co. v. Alaska, 415 U.S. 919 (1974) 4, 10

Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955) 10

Lehigh Portland Cement Co. v. City of North Bay Village (Misc. No. 2364, 5th Cir. 1972), denying appeal in Southern General Builders, Inc. v. Maule Industries, Inc., 1973-1 CCH Trade Cases ¶ 74,484 (S.D. Fla. 1972) 8

Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 341 F. Supp. 1077 (E.D. Pa. 1972) 6

Malamud v. Sinclair Oil Corporation, 521 F.2d 1142 (6th Cir. 1975) 8

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 5

Mangano v. American Radiator & S.S. Corp., 438 F.2d 1187 (3d Cir. 1971) 6, 7

Perkins v. Standard Oil Co., 395 U.S. 642 (1969) .. 5

South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966), certiorari denied, 385 U.S. 934 8

State of Illinois v. Bristol Myers Company, 470 F. 2d 1276 (D.C. Cir. 1972) 6, 8

State of Washington v. American Pipe & Construction Co., 274 F. Supp. 961 (1967) 9

Twentieth Century Fox Films Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964) 10

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QUESTION PRESENTED

Does the State of Illinois, in its capacity as a builder of public buildings incorporating concrete block, have standing to sue the block manufacturers who fixed and artificially raised prices.

STATEMENT OF ADDITIONAL FACTS

Following criminal indictments of concrete block manufacturers in the Greater Chicago Area, and the acceptance of *nolo contendre* pleas, private treble damage actions were instituted by (a) the State of Illinois and its political

subdivisions; (b) masonry and general contractors; and (c) private builders.

The contractors and the private builders (indirect purchasers of concrete block) proposed settlements with the petitioners. The State expressed opposition to the adequacy of such settlements and their possible adverse effect upon the State's action. This opposition was withdrawn upon the approval of the Court of a stipulation of the settling parties. That stipulation provided, in part:

> "[The settling] defendants hereby affirm and agree that the settlement . . . shall have no effect whatsoever on, and be without prejudice to the State of Illinois case No. 73 C 2427. It is intended that the State of Illinois case will not be prejudiced by the settlement.
>
> The defendants will not take the position that the alleged claims of the plaintiffs and the purported class members in the State of Illinois case have been released or in any way diminished because defendants have settled the claims of masonry contractors and general contractors who purchased Concrete Block which was later sold to, or incorporated into, a building, or structure built for and owned by the State of Illinois, or the public entities named as plaintiffs," or class members. (Letter September 10, 1974, to Honorable William J. Bauer, District Judge from John E. Burke on behalf of defendants, attached hereto as Appendix A)

Petitioners moved for summary judgment claiming that the respondent State and its political subdivisions directly purchased buildings and only indirectly concrete blocks used in such buildings, and therefore they lacked standing to sue under the federal antitrust laws. They asserted that this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), held that only

the first purchaser from conspiratorial price fixers had standing to sue. Petitioners in support of their motions for summary judgment merely submitted questionnaire answers secured by respondents, which located building projects in which concrete blocks were used.

The District Court rejected this attempted misconstruction of *Hanover Shoe* (App. 15-7), but nevertheless, granted summary judgment on the basis of a distinction between "final consumers" and "ultimate consumers." The governmental plaintiffs were classed as "ultimate consumers," which the District Court held were precluded from antitrust standing by the Seventh Circuit decision in *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir.), *cert. denied sub nom., Illinois* v. *Commonwealth Edison Co.*, 375 U.S. 834 (1963).

On appeal, the Seventh Circuit reversed and held that *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co., supra,* which was principally relied upon by the District Court, was misconstrued. (App. 7-8)

ARGUMENT

I.

HANOVER SHOE DOES NOT ESTABLISH AS A RULE OF LAW THAT ONLY THE FIRST PURCHASER OF AN ILLEGALLY PRICE FIXED PRODUCT HAS STANDING TO SUE UNDER THE FEDERAL ANTITRUST LAWS.

Standing to sue was not an issue in *Hanover Shoe.* The holding simply rejected a pass-on *defense* in large part as a matter of policy to further and fortify private litigation as one of the surest weapons for effective antitrust enforcement. It was in that connection that the Supreme Court spoke of the difficulties of proof, under the unique circumstances of that case, to establish or disprove the pass-on defense. The decision did not involve pass-on "as a theory of recovery in the nature of an offense." *In re Western Liquid Asphalt Cases,* 487 F.2d at 197. *See also Boshes v. General Motors Corp.,* 59 F.R.D. 589 (N.D. Ill. 1973, Decker, J.).

As Judge Blumenfeld held in *In re Master Key Antitrust Litigation,* 1973-2 Trade Cas., ¶74,860, p. 94,978 (D. Conn. 1973), *aff'd,* 528 F.2d 5, 12 n.11 (2d Cir. 1975):

> ". . . defendants' invocation of *Hanover,* which rejected a proposed pass-on defense in order to ensure that those who violated the antitrust laws did not escape liability through a multiplication of legal complexity, strikes a discordant note. . . . The attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision and its underlying rationale on its head."

This Court, in *Hanover Shoe,* did not consider or discuss the offensive rather than defensive use of pass-on where an antitrust plaintiff purchases price-fixed products through middlemen. That decision cannot be taken as establishing an immutable rule that there is no economic connection between a contractor's material costs and his price to the owner for the materials used in construction. The Court's reference to cost-plus contracts was presented as an example where damage proof is facilitated. 392 U.S. at 494. It was not meant to be exclusive; much less should it limit the right of governmental entities to trace the illegal overcharges on concrete block through contractors.

The Seventh Circuit decision here involved is in complete accord with the holding of *Hanover Shoe* and its purpose in seeking to strengthen private antitrust enforcement.

The principle is clear. Section 4 of the Clayton Act provides that "any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." This Court has repeatedly stressed the broad reach of the antitrust laws and of that section and has held that standing to sue does not turn on the relationship of the claimant to the price fixer. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948); *Perkins* v. *Standard Oil Co.,* 395 U.S. 642, 648 (1969).

More recently, in *Hawaii* v. *American Oil Co.,* 405 U.S. 251 (1972), the Court while denying a state the right to proceed in a *parens patriae* action, recognized the standing of consumer citizens (indirect purchasers) to bring antitrust actions and commended the use of consumer citizen class actions brought by states "to enhance the efficacy

of private actions . . . [and] achieve a more powerful litigation posture." 405 U.S. at 266.

Indeed, *State of Illinois* v. *Bristol Myers Company*, 470 F.2d 1276, 1278 n.4 (D.C. Cir. 1972), construed *Hawaii* as supporting the standing to sue of indirect purchasers.

Hanover Shoe rejected the pass-on defense against a suit by direct purchasers; it did not sanction that defense in a suit by indirect purchasers. There is no conflict between the Seventh Circuit's decision here and this Court's decision in *Hanover Shoe*.

II.

THE MANGANO WEAKNESS

Petitioners further contend a conflict exists between the Third Circuit's decision in the plumbing fixtures antitrust litigation of *Mangano* v. *American Radiator & S.S. Corp.*, 438 F.2d 1187 (3d Cir. 1971), and the Seventh Circuit's decision here involved and with other circuits that have recognized standing of indirect purchasers to sue for overcharges resulting from antitrust violations.

Mangano is limited to the circumstances of that case. It is *sui generis* and obsolete on the basis of the subsequent developments of the law in this area.

In the *Mangano per curiam* decision affirming the lower court's summary dismissal, the Third Circuit carefully limited its holding to the "circumstances" that the dismissal below was based on "the district court's sound discretion to dismiss the actions of the present appellants solely for inexcusable failure to answer interrogatories." 438 F.2d at 1188.

Moreover, counsel for plaintiffs abandoned further judicial review because "defendants have paid him $25,000 to cover his expenses in the *Mangano* case in return for his agreement not to seek certiorari" and he received an additional $19,000 in fees from the settlement that defendants made for his clients. *Lindy Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077, 1095 (E.D. Pa. 1972).

The plumbing antitrust litigation itself illustrates the possible evil consequences of *Mangano*. Defendants used the "passing-on defense" to reduce their exposure to indirect purchasers and, at the same time, avoid substantial liability to their initial (and often friendly) purchasers—the contractors. *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971), affirmed the trial court's approval of the contractors settlement rejecting the argument it was too cheap a settlement. Despite the prior decisions in *Mangano* that indirect purchasers had no standing to recover damages, the Third Circuit saw no reason for the initial purchasers to recover at all, stating:

> "the claims of this class [contractors] were minimized by the probability that overcharges made upon them were passed on to their customers." 453 F.2d at 34.

As Judge Blumenfeld in *In re Master Key Antitrust Litigation, supra,* pertinently commented on page 94,980:

> "Thus, the defendants in the plumbing fixtures cases managed neatly to have it both ways. They escaped any liability to the ultimate purchasers, and then got off with reduced damages on the theory that the parties who had suffered legally cognizable injury had passed on their losses to those same ultimate purchasers. No result could more effectively undercut the important congressional policy embodied in the Clayton Act, which includes awards of treble damages as its primary weapon of enforcement. Dismissal of the governmental plaintiffs at this stage of

the present litigation would provide the stage for the same acrobatics so dextrously performed by the *Mangano* defendants."

As against this outmoded decision in *Mangano* there has been a consistent line of recent decisions by the Courts of Appeal recognizing the standing of indirect purchasers to sue under the federal antitrust laws.*

There is no conflict between circuits with respect to the standing to sue of indirect purchasers.

III.

THE PASS-ON BY CONTRACTORS TO THE STATE PLAINTIFFS OF CONSPIRATORIALLY FIXED PRICES FOR CONCRETE BLOCK ARE FACTUAL QUESTIONS TO BE LEFT FOR PROOF AT TRIAL.

The complaint alleges and the evidence will show that the manufacturer's price fixing of concrete block had a direct and substantial impact on the governmental purchasers. The buildings in question were constructed pursuant to bids. The contractors and subcontractors submitted their bids based upon advance commitments from the manufacturers as to the cost of the block. The bidders plugged these known material costs into their bid as separate line items. This procedure resulted in a direct flow through of

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* *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276, 1278, n. 4 (D.C. Cir. 1972); *In re Master Key Antitrust Litigation*, 528 F.2d 5, 12, n. 11 (2d Cir. 1975); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 417-418 (4th Cir. 1966), certiorari denied, 385 U.S. 934; *Lehigh Portland Cement Co.* v. *City of North Bay Village* (Misc. No. 2364, 5th Cir. 1972), denying appeal in *Southern General Builders, Inc.* v. *Maule Industries, Inc.*, 1973-1 CCH Trade Cases ¶ 74,484 (S.D. Fla. 1972); *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484, 487-488 (5th Cir. 1967); *Malamud* v. *Sinclair Oil Corporation*, 521 F.2d 1142 (6th Cir. 1975).

In re Western Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied sub nom., Standard Oil Co. v. Alaska, 415 U.S. 919 (1974).

the overcharge resulting from the price fix plans incidental additional damages as a result of the contractor's habit of adding a fixed percentage markup on material.

The public agency thus purchased the concrete blocks indirectly at the alleged fixed excessive prices. A direct and readily provable relationship existed between the manufacturer-petitioners fixed prices for concrete block and the price paid by the State and its public agencies for building projects containing such concrete blocks. The contractors were nothing more than conduits passing through the overcharges to the State and its agencies.

This process of bidding on construction jobs was thus described in *State of Washington* v. *American Pipe & Construction Co.*, 274 F. Supp. 961, 963 (1967):

> "General contractors in bidding for the right to perform a project, of course included a pipe quotation in the bid, and, if the successful bidder, independently purchased pipe and 'resold' it to plaintiffs as part of the completed job. . . . Normally the contractors would but incorporate defendant's quotations in their bids, and purchase the pipe only when awarded a contract."

The Eighth Circuit in *Armco Steel Corp.* v. *North Dakota*, 376 F.2d 206 (8th Cir. 1967), similarly commented on the injury to the State resulting from a price conspiracy affecting metal culverts installed by contractors on state highway projects, as follows:

> "With the same price quotation for the product being made to all contractors bidding on a highway project, with this quotation being used by the contractors as their cost basis for the product in computing their project bid; and with the conspirators having knowledge of this bidding reality and making quotation of their unlawfully-fixed prices on that basis—there could hardly be much question that such prices,

> in their margin of artificiality from lack of competitive play, operated directly to injure the State in increased cost of its highway projects. Indeed, it would be difficult, if not impossible, for the jury to escape the conclusion that the use which was made of the products in the State's highway projects constituted a specific target of the conspiracy—which fact, though not necessary to a recovery right by the State, at least added clarity on the proximateness of the injury." 376 F.2d at 210-211.

It is evident that the petitioners as alleged price fixing conspirators of concrete block reasonably foresaw that the target or area affected by their conspiracy would be the State and its public agencies who constructed buildings using concrete block. The respondents here, were in the target area for which the federal antitrust laws afford protection. *Twentieth Century Fox Films Corp.* v. *Goldwyn,* 328 F.2d 190 (9th Cir. 1964); *Karseal Corp.* v. *Richfield Oil Corp.,* 221 F.2d 358 (9th Cir. 1955).

Petitioners in their earlier actions in these proceedings settled antitrust claims with the private builders despite the fact they were indirect purchasers to the same extent as public agency builders, thus recognizing the standing to sue of indirect purchasers.

What is involved in the State case, at this stage, are factual questions which should be left for trial. That is, whether illegal overcharges were passed on by contractors, the extent of such pass on and the allocation of damages between levels in the marketing process. *In re Western Asphalt Cases,* 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied sub nom., Standard Oil Co.* v. *Alaska,* 415 U.S. 919 (1974). Summary judgment was inappropriate to dispose of these issues under the guise of "standing to sue."

IV.

THE AFFIRMANCE OF STANDING BY THE SEVENTH CIRCUIT IS CONSISTENT WITH THE SWEEPING LANGUAGE OF THE STATUTE, THE POLICY ENCOURAGING PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS, THE DECISIONS OF THIS COURT AND THE SECOND, FOURTH, FIFTH, SIXTH, EIGHTH, NINTH AND DISTRICT OF COLUMBIA CIRCUIT COURTS.

Petitioners are mistaken in their views that affording standing to indirect purchasers would lead to "insufferable" and "prodigious" problems of proof and an "insolvable morass" consuming judicial energy. (Pet. Br. 10) What they are in effect seeking is the complete denial of the right of public agencies to redress injuries resulting from price conspiracies in the important construction field. In contrast, effective relief under efficient judicial management has been achieved by indirect purchaser public agencies involving construction materials such as gypsum wallboard, metal culverts, cast iron pipe, liquid asphalt, contract hardware, structural steel, brass mill tubing, steel conduit pipe, plumbing fixtures and many others.

Petitioners' claim of possible multiple recoveries for the same overcharge is especially inappropriate in this action, where petitioners expressly stipulated that their settlement with contractors would be completely without prejudice to the rights of the State of Illinois and its political subdivisions to recover for excess prices conspiratorially fixed on concrete block installed by contractors in public buildings and structures. (App. A)

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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October 13, 1976

APPENDIX A

September 10, 1974

Honorable William J. Bauer
U.S. District Court Judge
219 South Dearborn
Room 2156
Chicago, Illinois 60604

Re: State of Illinois v. Ampress Brick Company, Inc., et al.

Dear Judge Bauer:

This is to affirm the statements which the undersigned made on behalf of the defendants noted below during the hearing on September 5, 1974 in the Concrete Block litigation. Those defendants hereby affirm and agree that the settlement of the following cases: *Corona Construction Co., Inc.*, No. 73 C 1082; *Home Builders of America, Inc.*, No. 73 C 1278; *Mor-Well General Contractors, Inc.*, No. 73 C 1458 and *Normandy Hill, Inc.*, No. 74 C 652, shall have no effect whatsoever on, and be without prejudice to the State of Illinois case No. 73 C 2427. It is intended that the State of Illinois case will not be prejudiced by the settlement.

The defendants will not take the position that the alleged claims of the plaintiffs and the purported class members in the State of Illinois case have been released or in any way diminished because defendants have settled the claim of masonry contractors and general contractors who purchased Concrete Block which was later sold to, or incorporated into, a building, or structure built for and owned by the State of Illinois, or the public entities named as plaintiffs, or the members of a purported hospital class, in part supported by public funds.

Defendants have and will continue to maintain that the State of Illinois, the public entities named as plaintiffs and the members of the purported hospital class have not suffered damages recognizable under the antitrust statutes. The settlement will have no effect on this defense, or any other defense which the defendants may raise.

Finally, defendants agree that this settlement shall have no precedential effect with respect to the State of Illinois case.

Respectfully submitted,

/s/ JOHN E. BURKE
JOHN E. BURKE
On behalf of the defendants in the above named cases to be settled, namely Ampress Brick Company, Inc., American Brick Company, E. L. Ramm Company, Chicago Block Co., Inc., Illinois Brick Company, Heights Block, Inc., Northfield Block Co., SGM Corporation, Joliet Concrete Products, Inc., and Joseph Metz & Sons, Inc.

JEB:mfl
cc Lee Freeman, Sr., Esq.